

Nynex Corp., and its subsidiaries New York Telephone Company and Telesector Resources Group, Inc., d/b/a Bell Atlantic and Local 1105, Communications Workers of America, AFL-CIO. Cases 34-CA-7953 (formerly 2-CA-30651) and 34-CA-8130

November 22, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On June 13, 2000, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent also filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings and findings.¹ The Board, however, has decided to reverse the judge's conclusions that the Respondent violated the Act. Accordingly, the complaint shall be dismissed in its entirety.²

I. INTRODUCTION

The central issue in this case is whether the Respondent violated Section 8(a)(1) by taking action against the Union and its representatives after they attempted to meet and arrange grievance meetings with the staff director of the Respondent's Absence Benefit Center (ABC or the Center). The judge found that the conduct at issue was protected. Contrary to the judge, we find no violation, given the 2-hour cessation of work at the Center caused by the union representatives and their persistent refusal of the Respondent's demands that they leave.

II. FACTS

In 1995, the Respondent established an Absence Benefit Center staffed by licensed nurses to process and initially evaluate employee absences. The Center was lo-

cated in a secure area, where access was restricted to persons having a magnetic access card. Although some of the Center's nurses were temporary employees of the Respondent, others were employed by an outside agency. Although the Union represents employees whose absences were processed by the Center, it did not represent any employees who actually worked in the Center.³

The Respondent required that an employee who was to be absent for illness or injury contact the Center. There, a nurse case manager would gather information from the employee, determine whether the absence was "justified" under the sick leave provisions of the collective-bargaining agreement, and notify the employee's supervisor that the employee would be absent. The information gathered by the case managers was used to determine whether the employee would receive benefits under the collective-bargaining agreement. That decision rested with the employee's supervisor.

By 1997, the Center had become the focus of dispute between the Respondent and the Union. Union members alleged that the nurse case managers issued arbitrary decisions, were rude, and engaged in other inappropriate behavior. The Union filed numerous grievances on behalf of employees who had complained about the Center. Those grievances were filed with the employees' supervisors, pursuant to the contractual grievance procedure. The resolution of the grievances, however, took several months, which the Union claims led to increasing frustration among the unit employees.

In response to this alleged increasing frustration, the Union decided to send its executive board to the Center to request appointments to discuss absence-related grievances directly with the supervisors of the nurse case managers. The purpose of this action, according to the Union, was to show the Respondent that the Union was "serious" about obtaining appointments and to emphasize the importance of the issues related to the Center.

Thus, at about 8:15 a.m. on July 14, 1997, the Union's executive board, led by employee-member Paul Sapienza and using Business Agent Robert Shannon's company-issued magnetic access card, entered the Center unannounced, confronted a nurse case manager at her workstation concerning the whereabouts of her supervisor, and demanded to schedule appointments to discuss grievances.⁴ The Union had never attempted to submit

¹ The Respondent asserts that certain of the judge's credibility resolutions are a result of bias and prejudice. Specifically, the Respondent argues that the judge's discussion of the testimony of certain female witnesses was influenced by sex-based stereotypes and the judge's personal view of how female managers should react in the modern business world. Counsel for the General Counsel argues that it is the Respondent, not the judge, who is relying on sex-based stereotypes. In view of our disposition of this matter, we find it unnecessary to resolve this issue. Although the judge used certain imprudent language in discussing the testimony in sec. G,1 of the decision—which we specifically disavow—we have placed no reliance on this discussion in deciding this case.

² Inasmuch as they find that the complaint should be dismissed for the reasons set forth below, Members Liebman and Bartlett find it unnecessary to address the additional reasons for dismissing the complaint set forth in Member Cowen's concurrence.

³ Union representatives, however, had been issued access cards to the building because the Union represented several employees who worked in the Respondent's Benefits Delivery Center, which was located on the same floor as the Center.

⁴ Altogether, the union contingent comprised 13 union members. Twelve of the 13 union members were employed by the Respondent, but not at the Harrison facility. The remaining participant in the events of July 14, Keith Edwards, was not an employee of the Respondent.

grievances to anyone at the Center prior to July 14, and it never attempted to do so after that date. There is no evidence that prior to July 14 anyone at the Center played any role in the processing of grievances under the parties' collective-bargaining agreement.

Marie McDonnell-Foley, the staff director of the Center, was alerted to the Union's entry into the secure area of the Center and attempted to lead the union representatives to a conference room in a public hallway. Paul Sapienza, however, insisted on meeting with McDonnell-Foley in an employee lounge in the secure area. Sapienza spoke in a voice loud enough to be heard at some distance in the office. McDonnell-Foley acquiesced in his demand. She then left the union representatives in the lounge for several minutes while she did two things. First, McDonnell-Foley tried, unsuccessfully, to contact the Respondent's labor relations staff. Second, she instructed those nurses who were already on duty to leave their workstations and wait in the conference room.

In the meantime, the union contingent—left the employee lounge to look for McDonnell-Foley's office. They again began walking through the hallways and cubicles of the Center, this time recording the nurses' names and cubicle locations. McDonnell-Foley saw this activity and tried unsuccessfully to stop it. Then, after finally speaking with the Respondent's labor relations staff, McDonnell-Foley again confronted Sapienza and the union contingent. Sapienza repeated the Union's demand for a meeting to discuss grievances, but McDonnell-Foley refused. She demanded that Sapienza and his group leave the Center, warning that they were trespassing. She also advised Sapienza that the Union's grievances could be filed with the Respondent's labor relations department. Sapienza—who at this point had become “very aggressive, loud, and boisterous,” according to the judge's finding—insisted that the Union had a right to be at the Center to present grievances. Once, again, however, McDonnell-Foley asserted that they were trespassing and added that the employees in the group could be subject to discipline if they did not leave the Center. When the union group still refused to leave, McDonnell-Foley summoned the police.

The arrival of the police eventually led to the Union's departure from the Center at about 10:15 a.m. The Respondent did not press criminal charges against the union representatives. Two days later, though, the Respondent issued 2-day suspension notices to the 12 employees who had participated in the July 14 incident, advising them that they had engaged in a “disruption of work operations” and had “refus[ed] to follow a direction by management to leave the work area.” On July 17, the Respondent sued the Union and all 13 union members in-

volved in the July 14 incident in State court for trespass. Shortly after July 14, the Respondent unilaterally cancelled Business Agent Robert Shannon's magnetic access card. Four months later, the card of local Union Steward Joseph DeBiase was also cancelled. Shannon and DeBiase thus could no longer meet with their constituents in the Benefit Delivery Center at will, but rather had to obtain an access card from the Respondent on each visit.

III. THE JUDGE'S FINDINGS

The judge found that the Union's actions were protected under Section 7 of the Act. She therefore concluded that the Respondent violated Section 8(a)(1) of the Act by: (1) suspending the employees who sought to present grievances at the Center; (2) calling the police regarding the union representatives' refusal to leave the Center; and (3) filing the trespass lawsuit against the Union and the 13 individual union members. The judge also concluded that the Respondent violated Section 8(a)(5) and (1) by refusing to accept the employees' grievances and to make appointments to discuss the grievances, and by taking away Shannon's and DeBiase's magnetic access cards, thereby unilaterally changing the terms and conditions of the Union's right of access to unit employees.

IV. ANALYSIS

We find that the union representatives caused a 2-hour disruption of work at the Center and persistently refused McDonnell-Foley's demands that they leave. In light of this conduct, the Respondent did not violate the Act when it summoned the police to the Center on July 14, suspended the 12 employee-union representatives involved in the events of that day, or filed its trespass lawsuit against the Union and the representatives. Similarly, we find that the Respondent, faced with the Union's actions on July 14, did not violate Section 8(a)(5) and (1) by refusing to accede to the Union's demands. Last, we find that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally canceling Shannon's and DeBiase's magnetic access cards.

The Union Representatives' Actions Exceeded the Protections of the Act

Section 7 of the Act grants employees the right to engage in “concerted activity” for the purposes of “collective bargaining or other mutual aid or protection.” The filing of grievances unquestionably is protected, concerted activity. See *Aluminum Co. of America*, 338 NLRB 20 (2002); *United Parcel Service of Ohio*, 321 NLRB 300, 323 (1996). But the Board must also take into account the right of employers to maintain order and to use their premises. See *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 (7th Cir. 1965), *enfg.* 148 NLRB 1379

(1964). Thus, activity is protected if carried out in a manner that is abusive or unjustifiably disruptive of an employer's operations. See, e.g., *Carolina Freight Carriers*, 295 NLRB 1080 (1989) (manner in which employee sought to communicate work protest message to other coworkers—taking over the hospitalwide computer system—was unprotected); *Washington Adventist Hospital*, 291 NLRB 95, 95 fn. 1 and 102–103 (1988) (finding that employee lost the protection of the Act where he took over hospitalwide computer system to communicate otherwise protected message to coworkers). That is what happened in this case.

In sum, we find that the manner in which Sapienza and the union representatives acted on June 14 was unprotected and that the Respondent lawfully reacted to this unprotected misconduct, not to any grievance that the representatives may have been attempting to present. These union representatives entered the working area of the Center during the nurses' working time, loudly confronted nurse case managers at their cubicles, refused to meet with McDonnell-Foley in a conference room in a public area, and wandered the work areas of the Center recording the nurses' names and cubicle locations. The union contingent's actions caused McDonnell-Foley to direct her staff to stop working, resulting in a 2-hour cessation of the Center's operations.⁵ McDonnell-Foley attempted to restore order by demanding that Sapienza and his group leave the Center. However, Sapienza, in a "very aggressive, loud, and boisterous" manner (as the judge found), persistently refused McDonnell-Foley's demands, notwithstanding her warnings that the union group was trespassing and that employee-members of the group could be subject to discipline if they did not leave the premises. Considering the totality of these circumstances, but with particular emphasis on the disruption of the nurses' work and the union contingent's persistent refusal to leave the Center at McDonnell-Foley's repeated request, we find that the Respondent did not violate Section 8(a)(1) when it summoned the police to as-

sist it in restoring order at the Center, suspended the 12 employees involved in the July 14 incident, and sued the Union and the union representatives for trespass. See, e.g., *Loehmann's Plaza*, 316 NLRB 109, 114 (1995) (employer's pursuit of lawsuit to enjoin union picketing on employer's premises was not unlawful where picketing was unprotected).⁶

V. THE RESPONDENT DID NOT UNLAWFULLY REFUSE THE UNION'S DEMANDS

We also find, contrary to the judge, that the Respondent did not violate Section 8(a)(5) and (1) by refusing on July 14 to immediately accept the Union's grievances or take appointments to discuss the grievances. To begin, the Respondent did not refuse altogether to accept the Union's grievances or to discuss matters concerning the Center. As the Respondent points out, McDonnell-Foley provided Sapienza with the name and telephone number of another company representative with whom the Union could make an appointment. Sapienza moreover conceded that after July 14 he filed the grievances with the employees' immediate supervisors, as he had done in the past with some 100–150 other grievances related to the Center. Thus, the question really is limited to whether, in the face of the Union's actions on July 14, McDonnell-Foley's failure to immediately accede to Sapienza's demands constituted an unlawful refusal to bargain in violation of Section 8(a)(5). We find that it did not. See *Santa Clara Lemon Assn.*, 116 NLRB 44, 44–45, 63–65 (1956) (employer's refusal to immediately discuss a discharge with an employee-steward who had left her workstation without permission, and who refused repeated orders to return to work, was not an unlawful refusal to bargain; by requiring bargaining at reasonable places and times, "Congress did not . . . require that employers meet at any time, at the whim or caprice of any representative of the employees").⁷

⁵ The judge found no evidence that the Union's occupation of the Center prevented the nurses from doing their work, suggesting that McDonnell-Foley was independently responsible for the disruption of the Center's operations. We disagree. The nurses' work consisted of receiving confidential medical information from employees, discussing the information with the employees, typing the information onto computer screens, and then e-mailing the information to the employees' supervisors. In these circumstances, we find that was reasonably foreseeable that the Union's presence in the nurses' working area would cause McDonnell-Foley to direct the nurses to cease working to protect the confidentiality of the employees' medical information. Significantly, McDonnell-Foley, prior to directing the nurses to cease working, offered to meet with the union representatives in a conference room outside the nurses' working area, but, as described above, Sapienza refused this offer.

⁶ Member Liebman observes that the result here is also consistent with cases such as *Cambro Mfg. Co.*, 312 NLRB 634, 636 (1993); *Postal Service*, 282 NLRB 686, 694 (1987); and *Volt Information Sciences*, 274 NLRB 308 fn. 6 (1985), in which employees engaged in otherwise protected activity were held to have lost the protection of the Act based on their abusive or unjustifiably disruptive behavior. While the Union's attempt here to meet and arrange grievance meetings with the staff director may have been protected conduct, the union representatives lost that protection by their subsequent conduct.

⁷ The Respondent also asserts that it was privileged to refuse to accept the Union's grievances on July 14 because the Union, by attempting to file the grievances with McDonnell-Foley, was either ignoring or trying to unilaterally alter the contractual grievance procedure. The General Counsel maintains that the grievance procedure may reasonably be interpreted to permit the filing of grievances at the Center. We find it unnecessary to decide these issues and, accordingly, express no view on the parties' respective contentions.

VI. THE RESPONDENT DID NOT UNLAWFULLY CANCEL
THE UNION'S ACCESS CARDS

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally canceling Union Representatives Shannon and DeBiase's magnetic cards for gaining access to the workplace. Specifically, the judge found that the breach of past practice in this regard was a "material, substantial, and significant" change. We disagree.

Prior to July 14, union representatives enjoyed virtually unlimited access to Respondent's facility. After the July 14 disruption of the ABC, however, the Respondent beefed up security at the facility, canceling the magnetic cards held by any person who did not have regular business there at least once a week. As a result of the cancellation, union representatives, among others who visited the facility less regularly than once a week, were required to stop and present identification in order to gain access.

In *Peerless Food Products*, 236 NLRB 161 (1978), the employer narrowed its practice of allowing general access to one confining to the production areas of the plant to persons whose presence was necessary and required, and excluding all others. Finding the change to be de minimis, the Board noted that

not every unilateral change in work, or in this case access, rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to "a material, substantial, and a significant" one. *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976) [footnote omitted], and we do not believe the access limitations imposed here amount to that.

The Respondent's new security procedures did not limit the Union's movement within its facility or result in the Union's being denied access to any unit employees at the workplace.⁸ Union representatives were not required to obtain the Respondent's permission in order to enter the facility and could borrow access cards from management or rank-and-file employees situated at the front desk. Under these circumstances, as in *Peerless Food Products*, supra, the Respondent's access restrictions were not material, substantial, and significant.⁹ Accord-

⁸ Although Union Business Agent Joseph DeBiase testified that in November 1997 he met with unit employee Mary Hussey after she was directed to meet with him outside the work area, the judge noted that the record is not clear as to why this happened. DeBiase also testified that since the summer of 1997 he was given an access card each other time he visited union members at the facility.

⁹ *Frontier Hotel & Casino*, 323 NLRB 815, 817-818 (1997), relied on by the judge, is distinguishable. In that case, the employer directed

ingly, the Respondent did not violate Section 8(a)(5) of the Act, and we shall dismiss this complaint allegation.

ORDER

The complaint is dismissed.

MEMBER COWEN, concurring.

I join my colleagues in the dismissal of the complaint. I write separately to express the additional reasons why certain allegations of the complaint lack merit.

I agree that the Respondent was privileged to take action against the union representatives because of the manner in which they behaved in presenting their grievances. Fundamentally, however, in finding that their conduct was unprotected, there is no doubt that they had no right to be on the Respondent's property in the first place. In general, employees do not have an unfettered right to engage in concerted activity in any locus they choose. The law requires a balance between the right of the offsite off duty employees to engage in concerted activity and the employer's property right to exclude them from interior areas of its facilities. See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (accommodation between employees' Section 7 rights and employers' property rights must be obtained "with as little destruction of one as is consistent with the maintenance of the other").¹ Even onsite employees, for example, do not have the right to engage in such activity on worktime or in work areas. See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

In a general sense, any employee engaged in activity on the employer's property which is objectionable to the employer could be deemed a trespasser.² Even onsite

security guards to require union representatives to acknowledge in writing familiarity with the union-access provisions of the expired contract as a condition to entering the facility. In rejecting the employer's argument that the restriction was de minimis, the Board noted that "the [r]espondent's new restriction was specifically aimed at union representatives and it actually resulted in denying employee access to the representatives on the day the restriction was imposed." *Id.* at 818. Here, the new procedures were general restrictions that applied to anyone who conducted business at the facility on a less frequent basis than once a week. Furthermore, there is no evidence that they resulted in union representatives being denied access to any unit employees.

¹ See also *Hillhaven Highland House*, 336 NLRB 646 (2001) (balancing rights of offsite off duty employee with the respondent's private property rights to exterior areas of its facilities); *Peck, Inc.*, 226 NLRB 1174, 1175 (1976) (workers who occupied employee lunchroom after shift ended engaged in illegal trespass).

² *Hillhaven Highland House*, supra at 649. ("Broadly viewed, of course, any employee engaged in activity to which the employer objects on its property, might be deemed a trespasser, not an invitee: the employer arguably is free to define the terms of its invitation to employees."). In *Hillhaven*, the Board held that offsite employees have a Sec. 7 right of access to their employer's facilities for the purpose of organizing, although the access in that case was limited to an outside nonwork area.

employees may be considered trespassers if they seek access to the employer's property when they have not been invited on to the property, e.g., when they are off duty.³ In those cases where offsite or off duty employees have been allowed access to the employer's property, the access has been limited to outside, nonwork areas such as a parking lot.⁴ They have not been allowed to enter en masse into an active area. In weighing an employer's reasons for denying access to offsite employees, the Board takes into account the employer's "predictably heightened property concerns." The Board has acknowledged that an influx of offsite employees might raise security problems or other difficulties that "might well justify an employer's restriction (or even prohibition) of such access."⁵

Here, the Respondent operates two separate offices on the third floor of a building, the Absence Benefit Center (ABC or the Center) and the Benefit Delivery Center. Only the employees in the Benefit Delivery Center are represented by the Union. Entrance to both offices is through a door controlled by an electronic access device. The ABC employees and the Benefit Delivery Center employees have access to the secure work area by use of a magnetic card.

On July 14, Robert Shannon, the union business agent who served the employees in the Benefit Delivery Center, used his magnetic access card to allow all 13 union members, including himself, to enter the secure area. Not one of the 13 union members who entered the secure area worked in the building. One of the 13 was not even employed by the Respondent. Thus, all of the union members were either offsite workers or nonemployees. The nonemployee had no right at all to be on the Respondent's property, as there were clearly an alternative ways available to present the grievances.⁶ Assuming arguendo that the offsite employees had some right to enter the ABC offices initially,⁷ once they engaged in

objectively disruptive behavior, and the Respondent, through Staff Manager Marie McDonnell-Foley, ordered them to leave, any license the offsite employees might have had to be on the premises was revoked. At that point, they had no right of access to the Respondent's facility. Their remaining in a work area after having been asked to leave is not protected by Section 7. Therefore, the suspension of the 12 employees was not unlawful.⁸

With respect to the 8(a)(5) allegation that the Respondent refused to accept the Union's grievances note that the Union and the Respondent were parties to a collective-bargaining agreement which provided a grievance and arbitration procedure. The first step of the grievance procedure, described in article 13 of the agreement, requires that grievances be presented

to the immediate supervisor or a higher ranking supervisor in the department having authority in the matter and the appropriate representative of the Union. The grievance shall be reviewed at a meeting of not more than three (3) Union representatives and not more than three (3) representatives of management one of whom shall be the immediate supervisor or a higher ranking supervisor in the department having authority in the matter.

Although the Union had historically presented grievances to a grievant's immediate supervisor, it interpreted the language of article 13, which allows for presentation of a grievance to "a higher ranking supervisor in the department having authority in the matter" to mean that the Union could go to another department with its grievance. The Union read "having authority in the matter" to modify "department," and concluded that it could take its grievances to the ABC as "the department having authority in the matter." The Respondent, on the other hand, interpreted "having authority in the matter" to modify "supervisor" and therefore understood that the Union could go only to another higher ranking supervisor in the grievant's department. Although the judge acknowledged the Union's reading of the agreement to be a "novel" interpretation, he nevertheless concluded that the Union's act of demanding to schedule grievances at the ABC was protected, and that the ABC's refusal to accept those grievances violated the Act.

I agree with my colleagues that the Union had no right to dictate the time and place of its presentation; it likewise had no right to choose the representative of the Re-

³ Id.

⁴ See, e.g., *New York New York Hotel & Casino*, 334 NLRB 772 (2001) (off duty employees of restaurant operating on the respondent's premises were entitled to handbill in nonwork areas, absent evidence that their handbilling would interfere with production or discipline); *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976) (except when justified by business reasons, a rule which denies off duty employees entry to parking lots, gates, and other outside nonworking areas is invalid). In *Tri-County Medical*, the Board also established clear criteria for adopting a rule regarding off-duty employee access to the employer's property, providing that an employer may restrict access to the interior of the workplace or other working areas.

⁵ Id.

⁶ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (nonemployees have no right of access to an employer's property unless there is no reasonable alternative available to exercise the relevant Sec. 7 rights).

⁷ See fn. 9, supra.

⁸ See, e.g., *Loehmann's Plaza*, 316 NLRB 109, 114 (1995) (*Loehmann's Plaza II*) (employer's pursuit of lawsuit against union for picketing on employer's premises was not unlawful where picketing was found to be unprotected activity).

spondent in the grievance procedure.⁹ Neither did the Union have the right to unilaterally determine that article 13 gave it the right to present grievances to “the department having authority over the matter” or that the ABC was the authoritative department. The Union had no authority to force the Respondent to allow the ABC to process first-step grievances. If the Respondent concluded that the collective-bargaining agreement did not allow for the processing of grievances by the ABC, and therefore caused the ABC to refuse the Union’s grievances, then the Union’s remedy was to arbitrate to determine the meaning of article 13 of the agreement. In that forum the Union could voice its dissatisfaction with the Respondent’s handling of grievances related to the ABC. The Respondent was under no obligation to accept grievances at the ABC pending such an arbitration. Therefore, I find, for the additional reason to that expressed by my colleagues, that the Respondent did not violate the Act by the ABC’s refusal to accept the grievances.

Finally, I note that, with respect to the Respondent’s State court lawsuit for trespass, my colleagues correctly observe that this conduct cannot violate the Act inasmuch as the Union’s activity at which the lawsuit was directed was itself unprotected. However, even if that finding were to the contrary, there is still no violation. Under Board law,¹⁰ an employer violates the Act only if it does not stay a preempted State court lawsuit within 7 days of the General Counsel’s issuance of complaint. Here, the General Counsel issued complaint on August 14, 1998. Although the record is silent regarding the exact date of the Respondent’s motion to stay the State court proceeding, the Respondent’s counsel, in a letter dated September 3, 1998, confirmed that the lawsuit had been stayed. Moreover, it is not argued, nor did the judge find, that the Respondent continued the lawsuit after the filing of the complaint by the General Counsel. Accordingly, for this additional reason, the allegation that the lawsuit violated Section 8(a)(1) lacks merit.

⁹ See *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992) (a fundamental entitlement of the collective-bargaining process is that both labor and management have “the right to select representatives of [their] choosing for participation in the various phases of a complex collective-bargaining relationship and, absent extreme reason to the contrary, to be free of interference in the process from the opposite party”).

¹⁰ For purposes of this discussion, I find it unnecessary to pass on whether the precedent on which this finding is based, *Loehmann’s Plaza*, 305 NLRB 663, 671 (1991) (*Loehmann’s Plaza I*), was correctly decided.

MEMBER LIEBMAN, dissenting in part.

Unlike my colleagues, I would affirm the judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally canceling Union Representatives Robert Shannon’s and Joseph DeBiase’s magnetic access cards to the Harrison facility.

Those cards gave the two representatives effectively unrestricted access: they could enter the facility at will, without advance notice to the Respondent. There is surely a significant distinction between this freedom and the restrictions then imposed by the Respondent, which required Shannon and DeBiase to request an access card upon each visit and also required them to identify the unit employee being visited. In effect, the Respondent’s new policy forced the Union to identify those employees involved in union activities or those seeking assistance from the Union with workplace issues. This aspect of the Respondent’s policy necessarily impacted the unit employees’ ability to meet with or submit complaints to the Union in confidence at the workplace.¹ In my view, this was a material and substantial change affecting the entire unit. Accordingly, I would affirm the judge’s finding.

Darryl Hale, Esq. and Lindsey E. Kendellen, Esq. for the General Counsel.

Michael Hertzberg, Esq., of New York, New York, for the Respondent.

Thomas M. Murray, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, NY on five days between January 27 and February 23, 1999. The Complaint alleges that the Respondent, in violation of Section 8(a) (1), (3) and (5) of the Act, caused the police to detain Union representatives, filed a lawsuit for trespass against the Union, suspended employees, refused to meet with the Union regarding certain grievances and changed the terms and conditions of access by Union representatives to the Respondent’s facility in Harrison, New York. The Respondent denies that it has violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed

¹ I recognize that the Union may have had regular meetings, at which members would have been able to meet with union representatives away from the Respondent’s watch. Unit employees who were not members of the Union, and as a result were likely not permitted to attend such meetings, would not have had the same opportunity.

by the General Counsel, the Union and the Respondent, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

The parties agree that the Respondent, a domestic corporation with an office at 1095 Avenue of the Americas in New York City and a facility located at 4 West Red Oak Lane, Harrison, New York, is engaged in providing telephone communication and related services. Annually, the Respondent derives gross revenues in excess of \$100,000 and receives at its New York facilities goods valued in excess of \$50,000 directly from points outside the State of New York. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Local 1105, Communications Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The parties agree that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Those employees described in Article 1, Section 2, Article 34 and Appendix A in the collective bargaining agreement between the Communications Workers of America, herein called CWA, and New York Telephone Company Commercial, Public Communications, Sales and Headquarters Department Downstate and the Telesector Resources Group, Inc., Downstate, effective by its terms December 4, 1989, as amended September 1, 1991 and April 3, 1994 through August 8, 1998.

The parties agree that at all material times CWA has been the exclusive collective bargaining representative of the unit and that Local 1105, hereinafter the Union, has been the designated representative of CWA for purposes of contract administration, including but not limited to grievance processing.

B. The Absence Benefits Center and Its Operation

In 1995 the Respondent established the Absence Benefits Center (the ABC) to deal with employee absences. The ABC is a location which receives recorded messages from employees who will be absent on a workday due to illness or injury. The Respondent's employees, including the employees in the unit above represented by Local 1105, telephone a toll-free number to report an absence and to provide a return telephone number. The employees' calls are returned by licensed nurses working at the ABC, also called nurse case managers, who seek details from the employees about the illness or injury and who determine whether the absence is "justified" pursuant to the sick leave provisions of the contract. The nurse case managers also send e-mail messages to the employees' supervisors notifying

them that the individual employees will be absent from work.² The information provided to the nurses by the employees is used to determine whether the employees will receive benefits under the collective bargaining agreement.

Before the Respondent established the ABC, the unit employees' immediate supervisors administered the pay treatment of workers who were absent or on disability. Employees who were ill or injured called the field supervisor who would take the appropriate information and make sure that the employees were being paid properly under the contract. Depending on an employee's length of service, he was entitled to be paid from the first day or the third day of absence. After the seventh day of absence, the personal physician would complete a form relating to the absence.

The ABC is located on the third floor of a building in Westchester County, NY. The third floor also contains other offices of the Respondent, including the Benefits Delivery Center in which employees represented by Local 1105 work. As one gets off the elevators on the third floor, a reception area is visible. There are also some conference rooms opening on the public hallway. The space where work is performed by the Respondent's employees is accessible through a door controlled by an electronic access device. Entrance is gained by bringing a magnetic access card into contact with the electronic device which then opens the door. Throughout this case, the parties have referred to the area within the electronic access doors as the "secure area." All of the Respondent's employees who work on the third floor have access to the secure area including the nurse case managers employed by the ABC as well as members of the Local 1105 bargaining unit, other employees and the managers who have offices at the site. All of the Respondent's employees use the kitchen and the lounge which are located within the so-called secure area.

In July, 1997 about 30 nurse case managers were employed at the ABC. They came to work at staggered times between 7am and 9am. None of the ABC employees were represented by a Union. Some of the nurse case managers were temporary employees of the Respondent and some were employees of an outside agency which had provided them to the ABC. All of the nurse case managers were registered nurses with the whole range of nursing experience including training in hospitals and work with patients and as case managers. In addition, some had specialized training or experience in mental health.

The physical location of the ABC consists of cubicles large enough to accommodate a desk and two or three standing individuals. The cubicles are connected by narrow walkways to which they open on one side. The walls of the cubicles do not reach the ceiling; a person standing in a cubicle can see over the walls into the surrounding area.

By 1997 the operation of the ABC had been a matter of dispute between the Respondent and various locals of the CWA for some time. Employees complained that the nurse case managers were rude and that they made arbitrary decisions about whether absences were justified and about how long em-

¹ The record is corrected so that at p. 463, L. 23 reads "qualifications or training"; at p. 512, LL. 19 and 20, the case name should read "Wright Line."

² Medical information relating to employees is kept in filing cabinets at the ABC and if a nurse is working on a particular case the information may be on the nurse's desk.

employees should be absent for a particular indisposition. There were complaints that the nurses would often decide on the first day of an illness how long the employee should be absent and that they would inform the employee that if he did not return in a certain number of days he would not be paid. One grievance concerned an employee who suffered a miscarriage and claimed that a nurse case manager had made harassing calls to her in the hospital about the length of time required for her recovery. Nurse case managers had the authority to inform employees that, based on the information on hand, the employee would not be "justified" for an absence nor would he be justified for further extensions of the absence. The record shows that the Union filed grievances on behalf of some employees who were not paid because their absences had not been justified by the nurse case managers. However, the record also shows that actual control over the pay treatment of employee absences rested with an individual employee's field supervisor. It is not clear on the record how the authority of the nurse case managers was coordinated with that of the field supervisors although it is evident that the nurse case managers did play a role in determining whether an employee would be paid for an absence.

The collective bargaining agreement provides in Article 13, Section 1:

Grievances shall be presented to the immediate supervisor or a higher ranking supervisor in the department having authority in the matter

The Union and its sister local unions complained that they could not resolve grievances about decisions made by the nurse case managers at the lower steps of the grievance procedure. Thus, when the Union presented grievances relating to actions taken by the ABC they were dealt with by the employee's immediate supervisor. The Union complained that the first and second step grievance representatives of the Respondent invariably told the unions that they had no authority to deal with actions taken by the ABC. When the grievance reached the third step, the management response was often that the ABC would not give management the information necessary to deal with the matter. The resolution of grievances concerning the ABC took a long time and was fraught with frustration for the employees represented by the local unions. ABC grievances took from three to nine months to resolve and most grievances about the ABC were denied by the Respondent. Sometimes the union stewards and business agents who were directly responsible for the earlier steps of the grievance procedure tried to talk to the nurse case managers at the ABC in order to resolve pay problems on behalf of the members.³ In May, 1997, the ABC nurses stopped returning these types of telephone calls from Union representatives.

In July, 1997 the Local 1105 executive board discussed the problems relating to ABC grievances. The board discussed the language of the contractual grievance procedure and decided that instead of presenting the ABC-related grievances to the

³ If the grievant recalled the name of the nurse case manager dealing with the particular absence the business representative might be able to speak to that nurse.

employees' immediate supervisors those grievances should be presented to the ABC "supervisor having authority in the matter". The Local 1105 executive board decided to present the grievances directly to the ABC and to request appointments to discuss the numerous pending grievances. Because the over 200 shop stewards were judged to be too large a crowd to send to the ABC, it was decided that the executive board itself should present the grievances and seek appointments to discuss them.

I note that on October 21, 1998, Administrative Law Judge Wallace H. Nations issued his decision (JD-178-98), in a case involving the Respondent and Local 1112, CWA. In that case, Judge Nations found that the Respondent had violated Section 8 (a) (1) and (5) of the Act by failing and refusing to supply in a reasonable time information requested by Local 1112 which related to the operations of the ABC. That case involved only Local 1112. Local 1105, the Union herein, was not a party.⁴

Marie McDonnell-Foley is the staff director of the Absence Benefits Center. She has been employed by the Respondent in various capacities for over 21 years. McDonnell-Foley testified about a weekend in mid-April 1997 when instead of the usual ten new cases called in to the ABC there were about 300 hundred calls to the ABC. By the close of business on Monday, there were about 1200 new cases. McDonnell-Foley received telephone calls from some field supervisors saying that although they had received electronic notification that an employee was going to be absent, the employee was in fact at work. The Respondent investigated the large volume of calls and determined that they were made from a few telephone numbers including one number belonging to another Local of the CWA.⁵

C. Events of July 14, 1997

1. Testimony of the General Counsel's witnesses

Paul Sapienza is a 20-year employee of the Respondent. As the executive vice president of Local 1105 he sits on the executive board of the Local, he processes third-step grievances and he keeps the records of grievance procedures.

Sapienza testified that on July 14, 1997, most of the members of the executive board of Local 1105 and two staff assistants arrived at the ABC location at about 8:15 a.m.⁶ All the members of the Union group wore red golf shirts with an embroidered CWA Local 1150 logo.⁷ Sapienza was attired in dress jeans and sneakers. The Union representatives took the elevator to the third floor. There, Robert Shannon, a Local

⁴ The Administrative Law Judge's Decision was not appealed to the National Labor Relations Board.

⁵ There is no suggestion in the record that Local 1105, the Charging Party herein, played any part in placing the large volume of calls to the ABC in mid-April. Of course, some of those calls were genuine in that they reported actual absences due to illness and injury.

⁶ The group included, Paul Sapienza, Roberto Perez, Joanne Amico, Dexter Hendon, Keith Edwards, Denise Hawley, Frank Paxton, Robert Shannon, Nelson Zapata, Lillian Dinker, Joyce Augustus, Doreen Sedley and Patty Egan. Keith Edwards was not an employee of the Respondent.

⁷ Since 1989 CWA members have worn red on Thursdays and other days of significance as a demonstration of their solidarity.

1105 business agent, used his access card to open the door to the secure area and the group entered the work area. Sapienza testified that the group soon encountered two people. Sapienza introduced himself and said that the executive board was there to file grievances. He asked where nurse Carol Singer was because she was the subject of the first grievance they intended to present. After being directed to Singer, the group proceeded to her cubicle. Once there, Sapienza greeted Singer, identified himself and asked her to direct them to her supervisor so that he could file a grievance.⁸ Singer gestured in a direction and said that she did not know if her supervisor was in yet because most people did not arrive until 9 a.m.

McDonnell-Foley then approached the group and asked what they were doing. Sapienza introduced himself and the others and told her that they were there to request appointments to discuss grievances relating to the ABC. McDonnell-Foley said that if they followed her she would talk to them and she motioned them outside the magnetic access door. Sapienza saw a hallway with a number of elevators and he told McDonnell-Foley that that was not an appropriate place to meet. He asked if they could meet in a lounge near the door inside the secure area. Sapienza had used the lounge in the past when he met with Local 1105 members who worked on the third floor. McDonnell-Foley asked to be excused for a moment and Sapienza replied that the group would wait for her return. When she did not return after ten minutes, the Union representatives went looking for her. As they walked down the hallway, they met two people and asked for McDonnell-Foley's office and continued down the hallway. Shannon copied the names appearing outside the cubicles for future reference in grievance processing. Again the group was approached by two people who told them not to go into the cubicles and not to look at any information in the cubicles. Sapienza responded that they had not entered into any cubicles but that they wanted to find Foley. The people led Sapienza toward McDonnell-Foley's office. At some point a woman asked the names of the Union representatives and Sapienza directed those in his group to give her their names.

McDonnell-Foley then appeared walking toward Sapienza. In response to his request that she give him an appointment to discuss grievances, she said that she had no intention of making an appointment and she said, "I'm going to have to ask you to leave." Sapienza replied, "You may ask but my intention is not to leave until you give us the appointment." McDonnell-Foley repeated her request that they leave and Sapienza repeated his determination not to leave until he had been given an appointment. McDonnell-Foley, who was accompanied by a man, told Sapienza that the Union was trespassing. Sapienza replied that they were not trespassing, that they had a right to be there and that they had members at the site. He said that they were there to present grievances and that they had a right to do that. Sapienza said, "If you think we're trespassing you can call the police or throw us out if that's what you want to do but we have every right to be here." The man with McDonnell-Foley said that he would like to throw them out. Sapienza told him to be

careful. Finally, McDonnell-Foley told Sapienza that if the Union group returned to the lounge she would talk about giving him appointments to discuss grievances. When the group returned to the lounge, McDonnell-Foley repeated that they were trespassing and had to leave. Sapienza told her to check with the Respondent's labor relations staff.

McDonnell-Foley left and after about 10 minutes two police officers came to the lounge. They informed Sapienza that NYNEX had called them because the Union was trespassing. Sapienza identified himself and the group. He told the officers that they were there to present grievances. While one officer went to speak to management, Sapienza told the other one that the group had every right to be there and that he would be glad to get the union attorneys to explain the position to the police. The police officer said that Sapienza had to stay where he was and could not leave. When the other officer returned from speaking to management, he informed Sapienza that the company claimed that the group was trespassing. Shannon then told the police that he had universal access to the Respondent's facilities and he demonstrated his card to the police. The officers said that they would call their supervisor and they told the Union representatives to wait in the lounge. Fifteen minutes later, Lieutenant Kamensky arrived. Sapienza and Kamensky spoke about the universal access card and about the Respondent's claim that the Union was trespassing. Sapienza telephoned John Hann, the member of the Respondent's staff responsible for dealing with Local 1105, but Hann would not speak to him. Sapienza again asked McDonnell-Foley to give him a grievance appointment but she refused. Sapienza and his group then decided to leave. Kamensky told them that they had to stay in the lounge because the Respondent's security department was on its way to investigate how the Union representatives had gained access to the facility. After 1/2-hour, Sapienza telephoned a Union attorney about the situation. Pursuant to his instructions Sapienza informed Kamensky that unless the group members were going to be arrested they wanted to leave. The Union group left the facility at about 10:15 a.m.

Sapienza testified that while the Union was walking around the third floor area he saw only a few people at work. Of the 22 cubicles he saw, most were unoccupied. Sapienza stated that his group did not disrupt the work of the nurse case managers. Union people did not chant or yell, they did not enter cubicles and they did not touch any medical files.⁹

Sapienza denied that McDonnell-Foley ever said that the Union representatives would be subject to disciplinary action by the Respondent if they did not leave the facility. In the event, Sapienza and all the other Union representatives were suspended for two days. On July 18, 1997, he received a summons in a trespass action filed by the Respondent. Sapienza stated that the Local 1105 membership did not ratify the actions of the executive board in coming to the ABC.

On cross-examination Sapienza acknowledged that he had never before submitted a grievance to a manager at the ABC. Management of the ABC was not used to dealing with the Union or handling grievances. Sapienza stated that all of the

⁸ Sapienza also told Singer that she had been the subject of a grievance.

⁹ Sapienza denied that the group sang the song "Old MacDonald Had a Farm."

members of the Local 1105 executive board present on July 14 were prepared to present various grievances relating to the ABC. He acknowledged that he could have obtained McDonnell-Foley's telephone number and contacted her before July 14. However, the purpose of having the executive board arrive at the ABC unannounced was to emphasize the issues and to demonstrate that the Union was serious about obtaining grievance appointments.

Sapienza testified that in April 1997 a group of seven Local 1105 executive board members and staff went to the Respondent's facility on White Plains Road in the Bronx. Both represented and non-represented employees work at that location.¹⁰ The Union had received complaints from a number of employees about a supervisor's memo that was perceived to be offensive. The Union group entered the White Plains facility and asked to speak to the offending supervisor. That supervisor was not present, but other supervisors asked the group to leave. The union people said that they wanted to speak to the manager and file grievances. When the manager did not appear, the Union asked the employees to stand up and to continue working standing up. Then the manager appeared and met with the Union in a conference room. After the matter had been dealt with, the Union told the employees to sit down. According to Sapienza the Respondent did not discipline any of the Union group as a result of the April 1997 visit to the White Plains Road facility, it did not call the police and it did not file a lawsuit.

Sapienza testified that the collective bargaining agreement does not deal with access to the workplace by union representatives. The practice maintained between the Respondent and the Union has been one of "open access." Sapienza stated that when he goes to one of the Respondent's locations where the entrance is protected by a guard he identifies himself and is given free access to the building. If the guard has been replaced by an automated system then he uses the magnetic access card supplied to him by the Respondent to enter the facility. According to Sapienza all of the union officials have magnetic access cards supplied by the company. Sapienza has never had to request management's permission to obtain access to the workplace. Sapienza testified that during an adjournment of the instant hearing he had used his access card to gain access to the Respondent's facilities in Staten Island, Brooklyn and Manhattan.

Sapienza's testimony about the events of July 14 was corroborated by other members of the union group who were present that day. Both Joyce Augustus and Doreen Sedley described the events much as Sapienza had related them, albeit with minor variations. Both Augustus and Sedley were prepared to file grievances on July 14 concerning various actions taken by certain of the nurse case managers. Sedley testified that when the two police officers appeared at the facility they told the union group that they were being kept on the premises until corporate security arrived. In addition, the lieutenant told the Union representatives that they were accused of trespass

and until the matter was straightened out they would have to stay where they were. Sedley testified that when McDonnell-Foley was talking to Sapienza about whether she would discuss grievances with him she mentioned something about trespassing and disciplinary action, but Sedley could not recall exactly what McDonnell-Foley had said.

The record shows that on July 14, 1997, there were no signs posted at the West Red Oak Lane facility limiting access to the secure area of the third floor.

Robert Shannon is a Local 1105 business agent and a member of the executive board. Shannon testified that as a matter of practice he has access to the Respondent's facilities without asking permission of management. When Shannon became a business agent in 1991 he represented the then 80 unit members who worked in the Benefits Delivery System located at the West Red Oak Lane facility.¹¹ Shannon introduced himself to Robert Leonard, the division manager at the facility, and said that he needed access to the members. Leonard gave Shannon a magnetic access card for the third floor. Shannon has never had to check with management before visiting the facility. After the ABC was established on the third floor Shannon continued to visit the facility and he checked on the working conditions of his membership. Although the ABC personnel were now working in the same secure area with the Benefits Delivery System union members Shannon was not restricted in his movements on the third floor. He conducted meetings for the members in the lounge and he visited the area with other Union officials.

Shannon recalled that on July 14, 1997, the Union group arrived at the facility at 8:15 a.m. He saw a couple of nurses having coffee and talking and he asked them who was in charge of the ABC. The nurses said that McDonnell-Foley was in charge but that they did not know where she was. The group walked down the hall looking for Foley. They took down some of the nurses' names if they saw them posted outside the individual cubicles. About 15 or 20 minutes after the group entered the facility, Foley walked over to them. Sapienza introduced himself and said that he was there to make a grievance appointment. Shannon had a list of grievances that he wanted to file. McDonnell-Foley told the group to wait in the lounge while she went to get her calendar. When she failed to return after about 20 minutes, the union agents went looking for her. Shannon testified that McDonnell-Foley was in the hall with another female manager and two male managers. She asked the union group to leave. When Sapienza said that they were there to set up grievance appointments, McDonnell-Foley directed them back to the lounge. Shannon stated that two police officers arrived and that McDonnell-Foley told them that the Union was trespassing and that she wanted them removed. The union representatives told the police that they were company employees and union members and they showed their ID cards. One of the officers left to summon the lieutenant. The other officer stood in the door and told the group that they were not permitted to leave until the matter was straightened out. After about 20 minutes the lieutenant arrived and conferred with Sapienza

¹⁰ There are about 100 members of the unit in the facility and the managers commonly deal with on-site Union stewards and other Union agents.

¹¹ In 1996 the department was moved to Florida and now there are only five unit members remaining at the facility.

and McDonnell-Foley. Shannon denied that the Union representatives chanted, sang songs, spoke very loud or entered the nurses' cubicles. He denied that the work of any nurse was disrupted, pointing out that for most of the time between 8:15 and 9:45 that he was at the facility the Union contingent remained in the lounge.¹² He did not hear McDonnell-Foley threaten disciplinary action if the group did not leave the premises.

Shannon testified that on July 14 he saw a total of 15 to 20 people who were not members of the bargaining unit at the facility. Some were walking around and some were in cubicles.

2. Testimony of the Respondent's witnesses

McDonnell-Foley testified that on July 14, 1997, she arrived at work between 7:30 and 8am. There were some nurses working when she arrived and by 8:30 at least one-half of the nurse case managers were present. According to McDonnell-Foley she heard a commotion in the hallway and walked toward it to see a "sea of red with red T-shirts, about 15 people." The people were standing near nurse case manager Carol Singer's cubicle. McDonnell-Foley tried to squeeze between the people. There was a loud noise and everybody was speaking. McDonnell-Foley identified herself by name and title and asked, "Can I help you?" In response, Paul Sapienza, the executive vice president of Local 1105, introduced himself and said that he was there to see nurse Singer and other nurses whom he identified by name. McDonnell-Foley testified that Sapienza's voice was loud as though he were making a statement to a group. She told Sapienza that if he came with her they could talk. When pressed on direct examination to recount more of the initial conversation with Sapienza, McDonnell-Foley stated that she could not recall what Sapienza said. She thought he wanted to see specific nurses and he may have said that he wanted to file grievances. She testified that she was scared because she is not big and she was surrounded by 15 people who were mostly big men.

McDonnell-Foley stated that she tried to lead the group to a conference room but they "walked right by her" so she suggested that they go into the lounge. After the group was in the lounge, McDonnell-Foley told them that she had to get a pen and paper and that she would be right back. She returned to her office and called the labor relations staff of the Respondent. However she could not reach anyone. Eventually, she left voice mail messages for several different managers. As she left her office, she saw the union group in the corridor. She put her hands out and said that the group could not walk around because there was confidential medical information in the area. But the group ignored her and kept walking. McDonnell-Foley saw two account executives, Ruth Burns and Maureen Walsh, and told them, "We can't let them walk around here." She testified that she did not ask the two women to take any action.

Next, McDonnell-Foley went to the director's office outside the secure area where the executive assistant had some members of the Respondent's labor relations staff on the telephone.

¹² Shannon left the lounge to use the lavatory and he then waited downstairs until the entire Union group left the facility.

McDonnell-Foley spoke to a few of these people, perhaps including John Hann.

Next, McDonnell-Foley returned to the ABC with John Sias, an executive not involved with the ABC. She testified she asked Sias to accompany her because she is a woman and there were men there and "I was just scared." McDonnell-Foley and Sias encountered some union representatives in the hallways between the cubicles. One of them was writing on a pad of paper. McDonnell-Foley told the Union agents that they were trespassing and that they had to leave. Sias also told the Union people to leave. Union representative Robert Shannon asked Sias whether he was threatening him and Sias replied that the representatives should leave. McDonnell-Foley did not recall anything else that was said as part of this exchange but she did recall that Shannon was "very contentious."

McDonnell-Foley and the Union agents went back to the lounge and she repeated that the Union was trespassing, that the representatives would be subject to discipline if they did not leave and that she would call the police if the Union did not depart. Sapienza said that he wanted to file grievances with McDonnell-Foley but she replied that he would have to go through the labor relations staff. McDonnell-Foley testified that "they" told her to call the police, but she could not recall who had actually said that. She stated that she did not want to call the police but eventually she instructed Ruth Burns to summon them.

While McDonnell-Foley and the union group were in the lounge one of the group asked her for her name and telephone number. She replied that her name was Marie McDonnell. Then someone called her phone and heard her full name on her voice mail. McDonnell recalled that "they started laughing and singing the song 'Old MacDonald had a Farm.'"

Soon after this exchange two police officers arrived. McDonnell-Foley informed the officers that she wanted the Union representatives to leave. She testified that she did not ask the police to detain the Union group. One of the officers told McDonnell-Foley that he had to call his lieutenant. Then he informed her that he could not make the Union leave unless she pressed charges. McDonnell-Foley replied that she did not want to press charges.

Eventually, the Union group left.

According to McDonnell-Foley, the nurse case managers did not do any work on July 14. While the Union was there she took them away from their work and instructed them to sit in the conference room. Then, she met with them to calm her down. She believed they needed calming down because they had never experienced this type of event before. She added that the nurses spent the afternoon speaking to three psychiatric nurses. McDonnell-Foley stated that the nurses asked that a security guard be seated outside the elevators. Although the usual turnover at the ABC was two or three nurse case managers per month, about 20 of them resigned in July and August.¹³

¹³ No direct testimony was presented to show why 20 nurses resigned in the summer of 1997. Although the Respondent clearly seeks to blame Local 1105 for the resignations there is insufficient evidence to make a finding on this point.

On cross-examination by counsel for the General Counsel, McDonnell-Foley stated that she gave a statement about the July 14 incident to the Respondent's corporate security department on July 15. Her statement reveals that Maureen Walsh and Ruth Burns first informed her that there were people from the Union in the facility. The statement contains nothing about McDonnell-Foley becoming aware of the presence of the Union through a commotion in the hall. McDonnell testified that she did not call corporate security on the 14th and she could not recall whether she knew they were coming to the facility while the Union representatives were on the premises. Before July 14 she knew that the Union had filed grievances concerning the actions of the ABC and she recalled that on July 14 Sapienza said that he wanted to see the nurse case managers and that he wanted to file grievances. McDonnell said that Sapienza did not tell her that he wanted to set up appointments for grievances. She recalled that he was yelling as loud as he would have at a rally. At first, McDonnell-Foley did not recall that there were any women in the Union group, saying, "it just appeared that there were a lot of men there. They were bigger than I was." Finally, she acknowledged that of the 15 Union people one-half were women. McDonnell-Foley could not recall whether she told the police that the Union was trespassing but she did tell them that the group was in an unauthorized area. The police asked her how the Union group had gained access. McDonnell did not recall that a Union representative demonstrated his magnetic access card for the police.

Maureen Walsh is a staff manager at the ABC.¹⁴ Walsh, a 14-year employee of the Respondent, assists with the day-to-day operations of the office. She reports to McDonnell-Foley. Walsh testified that on July 14, 1997 she arrived at work between 8 and 8:15 a.m., she turned on her computer and then she went to the kitchen to get some tea. She noticed that some nurse case managers were present in their cubicles. As Walsh left the kitchen she saw some people wearing red T-shirts walking toward Carol Singer's cubicle. Walsh heard a lot of noise. She asked whether she could help the group and a man later identified as Frank Paxton replied that they were on a tour. Walsh could not recall any of the Union group informing her of the purpose of their visit. Walsh recalled a comment she heard: "Nice picture, nice kids, hope you love your kids, we now know what they look like." Walsh said she heard "something to that effect" but she did not offer any description of the person who said this. After encountering the Union representatives, Walsh went into McDonnell-Foley's office. Later, according to Walsh, she saw McDonnell-Foley quarreling with the Union representatives. She heard her asking them to come into the conference room but instead they went into the lounge. Still later, Walsh saw the group come down the hall to McDonnell-Foley's office. She saw McDonnell-Foley put her hands out across the hall and ask them not to proceed, but the Union representatives walked on nevertheless. McDonnell-Foley asked Walsh to follow the representatives and get their names. Walsh and Burns saw that the Union people were writing down the names of nurses who occupied the various cubicles. When

Walsh asked them for their names and asked to see some ID, they laughed. Walsh later saw the Union group in the lounge with McDonnell-Foley. Walsh said she heard McDonnell-Foley tell them that they were trespassing and that they might be subject to disciplinary action and that they should leave.

On cross-examination by Counsel for the General Counsel Walsh stated that she was interviewed by the corporate security department on July 14 for 25 minutes. Walsh wanted to tell the security department everything that had happened earlier in the day because she had felt intimidated by the Union group. The notes of Walsh's interview show that Walsh told corporate security that when she first encountered the Union representatives they told her that they were looking for McDonnell-Foley. The notes contain no mention that anyone told Walsh that they were "taking a tour" nor do the notes reflect that anyone made comments about any children's pictures in the nurses' cubicles.

Carol Singer was a temporary employee of the Respondent at the ABC facility in July 1997. Singer is a registered nurse with a master's degree in mental health nursing. Singer recalled that on July 14th she was sitting in her cubicle when she heard a loud voice asking for her by name. She stood up in her cubicle and as the Union group approached she saw seven or eight people wearing red shirts. Singer could not recall much about the events of July 14. She recalled that Sapienza spoke to her but she did not remember anyone else saying anything else to her. She testified that Sapienza was speaking very loudly and that he was angry but she could not recall anything that he said beyond asking to speak to Singer's supervisor. Singer stated that it was "a very traumatic incident because there were all these people there." Singer said that she was intimidated and frightened but she did not provide any details to show why she felt that way beyond Sapienza's loud voice and the fact that there were seven or eight people near her cubicle. Singer told Sapienza that her supervisor was Harriett Vogel. Then McDonnell-Foley came to Singer's cubicle and the Union group left. Singer related that the nurses were asked to leave and go outside the work area. Singer said that all the nurses were upset because "the Union had come in and invaded the work space, and disrupted all of us and . . . we weren't going to get anything done for a while." Singer gave a statement to the company's security representative that she told Sapienza that her supervisor did not make decisions on benefit cases but that she alone made these decisions.

John Sias, a 17-1/2 year employee of the Respondent, was no longer with the company when he testified in the instant hearing. Sias recalled that on July 14 McDonnell-Foley came into his office and said that she had a group of uninvited union members roaming around the floor. She asked Sias to help her get them to leave. Sias walked up to a group of four or five men at the end of a corridor and said, "Can I ask your name?" Someone said, "You can ask." Then Sias told the group that they were in a restricted area and would have to leave the premises. The union representatives said that they would not leave. Sias stated that he did not behave in a hostile or threatening manner and he did not say that he wanted to throw Sapienza out. Sias said that he was speaking in a tone loud enough for

¹⁴ Walsh manages the clerical staff. The supervisor of the nurse case managers is Carla Quinlan.

the Union to hear and that the union group was also speaking loudly but was not screaming.

John Hann, a 35-year employee of the Respondent, is the Director of Labor Relations. Hann testified that the ABC was a major issue between the Union and the Respondent and that hundreds of grievances concerning the ABC had been filed by the various bargaining units. Hann testified that he and other managers decided to discipline the employees who went to the ABC because they disrupted work operations, they intimidated employees and they refused to leave when asked to do so. He denied that the decision to discipline the employees was based on the Union's request to file grievances or to make appointments to discuss grievances.

On cross-examination, Hann testified that grievances concerning ABC decisions on absences were not being taken care of at the first step. Further, an issue relating to the Family Medical Leave Act had led to the filing of a lawsuit by the Union. Hann stated that the grievances concerning the ABC could lead to arbitrations that might cost the Respondent a lot of money. The company did not want the ABC to be part of the grievance procedure. Hann stated that before a decision was made to suspend the employees who went to the ABC on July 14th he received reports from the corporate security people orally and in writing. Hann acknowledged that usually before the company suspends an employee it conducts an investigation and asks the employee for his or her side of the story. In the instant controversy, however, he believed that it was outrageous that Local 1105 had invaded the workplace, intimidated employees, disrupted their work and refused to leave when asked.

Michael J. Kamensky, a Lieutenant in the Town of Harrison police department, testified that on July 14, 1997, he went to the West Red Oak Lane facility in response to a request from two police officers at the scene. The officers told Kamensky that they were conducting a criminal investigation for the possibility of a misdemeanor criminal trespass and possession of stolen property.¹⁵ Once he arrived at the facility Kamensky spoke to McDonnell-Foley who told him that the Union group was not supposed to be on the premises and she wanted them removed. When Kamensky asked her whether she wished to press criminal charges, she stated that she was unsure and that she would have to contact people in higher authority in the company. Kamensky spoke to Sapienza who said that the Union representatives had a right to be there and that they had authorized key cards. Sapienza said the Union was staying because the group wanted the officer manager to meet with them and to set up a meeting. Sapienza kept insisting that he wanted McDonnell-Foley to arrange a meeting. Kamensky recalled that when he spoke to Sapienza the latter was "very aggressive, loud and boisterous". Sapienza wanted to get his point across and at times his voice was elevated. But Sapienza was not abusive and he was not screaming. McDonnell-Foley was agitated and she seemed overwhelmed by the situation. After these two conversations, Kamensky spoke by telephone with John Hann who said that the company would handle the

matter internally and that it did not intend to press charges. Once Kamensky heard this, the matter was no longer a criminal investigation. At this point, the Union representatives were free to leave. Kamensky told Sapienza that the Respondent would not press charges and that it wanted him to leave the premises.

According to Kamensky, before he was told that the company was not pressing charges the situation was that the police were conducting a criminal investigation. While the criminal investigation continued the police were detaining the Union representatives as alleged suspects.

D. Suspensions

On July 16, 1997 the Respondent sent two-day suspension notices to all of its employees who participated in the July 14 attempt to present grievances to the ABC. The notices gave the following reason for the suspension: "your disruption of work operations and your refusal to follow a direction by management to leave the work area." The employees included:

Joanne Amico	Frank Paxton
Joyce Augustus	Roberto Perez
Lillian Dinker	Paul Sapienza
Patricia Egan	Doreen Sedley
Denise Hawley	Robert Shannon
Dexter Hendon	Manuel Zapata Jr.

E. Lawsuit Against the Union

On July 17, 1997, the Respondent commenced a lawsuit in the Supreme Court of the State of New York against Local 1105 and all 13 individuals who went to the West Red Oak Lane facility on July 14.¹⁶ The complaint alleges that access to the facility is limited to the Respondent's employees and invitees, that the individual defendants gained access to the premises by the improper use of a security access card and that the individual defendants intimidated and harassed the staff, blocked the hallways, entered private cubicles and caused business operations to cease completely for "approximately five hours." The complaint alleges that the "unlawful activities of the individual defendants ... were directed, authorized, condoned and approved by Defendant Local 1105." The damages, in excess of \$25,000, were left to be determined at trial.

On September 3, 1998, Peter D. Stergios, Esq., an attorney representing the Respondent in the New York State action for trespass, wrote to Counsel for the General Counsel stating:

[T]his confirms that we will not pursue that trespass action during the pendency of your Region's proceedings in this matter Should we receive any inquiry from the Court, we will respond by requesting that the action be held in abeyance pending the outcome of your proceedings.

F. Access to the Facility

Shannon testified that he went to the West Red Oak Lane facility at the end of July to meet with the Union members. His access card no longer opened the door to the third floor area and Shannon did not gain admittance that day. When Shannon spoke to one of the Respondent's managers in charge of labor relations he was told that he was being denied access through

¹⁵ The record contains no clue as to the matter of alleged stolen property.

¹⁶ Index No. 11359/97 was filed with the County Clerk on July 17.

the use of the card and that if he wished access to the facility he would have to see a manager. Now, when Shannon visits the members at the West Red Oak facility he must go to the reception area and ask for admittance. A receptionist notifies manager Joan Scott-Monck that Shannon is present and then the receptionist is directed to admit him to the secure area.

Joanne Baker the Respondent's Director of Employee Benefits is the highest-ranking manager at the West Red Oak Lane building. Baker testified that after July 14 she tightened up security to the facility on the recommendation of the corporate security department. Baker cancelled Shannon's magnetic access card. Thereafter Shannon had to obtain an access card whenever he visited the facility. It was not Baker's policy to deny him access to the facility.

Joseph DeBiase, a chief steward for Local 1105, testified that he used to have an access card for the West Red Oak Lane facility but that it had ceased working in the summer of 1997. His request to Scott-Monck for a replacement was denied. Instead, he is given a card each time he visits the unit members and he must return the card at the end of his visit. In November 1997 DeBiase went to confer with unit employee Mary Hussey. When DeBiase arrived at the facility and asked for an access card, Scott-Monck told him to wait and that she would get Hussey to see him. Shortly thereafter Hussey came out of the secure area and DeBiase met with her in the lobby area. Hussey told him that she had been directed to meet with him outside and that she had been told to leave her access card in the secure area and to ask a manager for admittance when she finished speaking to DeBiase. DeBiase testified that this method of proceeding meant that management was always aware when he met with a unit member and that he could not conduct surprise visits to check for safety violations and hazards in the workplace.

Staff director Joan Scott-Monck testified that for a number of years she has known both Shannon and DeBiase to come visit the unit members unannounced. However, as of November 1997 the Union agents were required to obtain access cards from management officials. The access cards must be returned after each use. In addition, a security guard has been posted outside the third elevator and the guard checks the ID of any person attempting to use an access card to enter the secure area. Scott-Monck testified that in November 1997 DeBiase told her that he had come to see unit employee Marie Hussey. Scott-Monck said that she was on her way to the secure area and so she told DeBiase that she would check to see whether Hussey was in. When Scott-Monck found Hussey she told her that DeBiase was there and that she would fetch him. Hussey said, "That's OK, I'll go out and see him outside." Scott-Monck testified that she did not tell Hussey to leave her pass before she went outside.

G. Discussion and Conclusions

1. Credibility of the witnesses

The testimony of McDonnell-Foley is difficult to accept on many points. McDonnell-Foley had a tendency to exaggerate her descriptions of the events of July 14. On direct examination she said that Sapienza's voice when she first encountered him was "loud" as though to address a group but on cross ex-

amination she stated that he was "yelling" as though at a rally. McDonnell-Foley sought to give the impression that the Union group was intimidating. She constantly referred to "men" and to the "sea of red shirts" they were wearing. In fact, the group was composed of an equal number of men and women. McDonnell-Foley implied that the wearing of a red polo shirt with a Union logo was frightening. The fact is that the Union group consisted of a bunch of middle-aged people wearing sneakers, hardly the revolutionary *sans culottes* who stormed the Bastille.¹⁷ In the absence of any objective facts to support her testimony that the Union representatives were physically intimidating or actually threatening, McDonnell-Foley repeatedly fell back on the complaint that she is a small person and she was surrounded by men or "big" men. The record shows that McDonnell-Foley has been employed by the company for 21 years and that she has risen to a position of executive responsibility. During this time she has doubtless dealt with many men including big men. Many times in her 21 years of employment she must have attended meetings where she was the only woman or in a distinct minority of women.¹⁸ McDonnell-Foley could not have risen to her present position if she could not deal with a situation where men were present, even big men. It is rather late in the day for a woman to expect a finder of fact to believe that the mere presence of men reasonably tends to intimidate a woman manager. I find that McDonnell-Foley's exaggerated testimony on this point was designed to make the Union visit look violent and shocking. Further, McDonnell-Foley's recollection was inexact. First, she testified that she became aware of the Union group's presence by a commotion. In fact, her own statement to the company security department stated that Walsh and Burns came to her office to tell her the Union was there. Second, McDonnell-Foley repeatedly testified that she could not recall what was said in many of the conversations that are central to the case. Thus she could not recall what Sapienza said to her when they first met. She could not recall that she instructed Burns and Walsh to follow the Union group and take their names.¹⁹ I conclude that McDonnell-Foley did not recall many of the facts she was asked about and that she shaded her testimony, and I shall not rely on her testimony where it is contradicted by more credible evidence.

Walsh testified on direct examination by Counsel for the Respondent that while she was standing with the Union group on July 14 she heard a comment about a nurse's children and the veiled threat "We now know what they look like." This is a very serious accusation. Although Walsh remembered that Paxton said the Union was "on a tour" she could not recall who made the implied threat on the staff member's children. Furthermore, Walsh's statement to the Respondent's security department given on July 14 did not mention the alleged threat. ~~If Walsh had indeed heard a threat to an employee's family on~~

¹⁷ The Respondent's brief has seized on the date of the Union's visit to the third floor of the West Red Oak Lane facility to draw an ill-founded analogy to the French Revolution.

¹⁸ At the instant trial, McDonnell-Foley was part of a very small minority of women on the Respondent's side of the courtroom. Indeed, on some days she was the only woman representing the Respondent.

¹⁹ Walsh testified that she and Burns followed this directive; apparently they were not afraid of men.

Walsh had indeed heard a threat to an employee's family on the morning of July 14 she could not have failed to relate this to corporate security later on the same day. I conclude that the threat was never made. I find that Walsh shaded her testimony to favor the Respondent's position and I shall not rely on her testimony where it is contradicted by more credible evidence.

Singer's testimony was not convincing. She stated that she was intimidated and frightened because seven or eight people were around her cubicle and Sapienza was using a loud and angry voice. As a trained nurse with a specialty in mental health nursing Singer was surely competent to deal with a person using an angry and loud voice without feeling intimidated and frightened. Since Singer could not recall what Sapienza said she obviously did not feel threatened or intimidated by anything he said to her. Nor did the Respondent proffer any testimony at all that Sapienza made threats or behaved in a physically threatening manner. Nurses are trained to document conditions and events. Because Singer did not recall any specifics of what Sapienza said to her or what he did that made her feel threatened or intimidated I do not credit her testimony. Moreover, her use of the term "invaded the work space" and "disrupted us all" is identical to the phrase used by Director of Labor Relations John Hann. This leads me to believe that the phrase was prompted more by the Respondent's legal strategy than by Singer's actual recollection of the events of July 14.

I find that all of the other witnesses herein testified in a straightforward manner given the normal vagaries of recollection and a tendency to favor one's own view of the case.

2. Resolution of factual issues

Based on my credibility discussion above, I find that the following events took place on July 14, 1997:

At about 8:15 a.m. 14 Local 1105 representatives took the elevator to the third floor of the West Red Oak Lane facility. Local 1105 business agent Shannon used the key card issued to him by the Respondent to open the locked door to the work area. The individuals of the Union group were there to present grievances concerning the operation of the ABC to a "supervisor in the department having authority in the matter." The Union believed that in this case the grievances should be presented to supervisors of the nurse case managers at the ABC.

Once inside the work area, the Union group located nurse Singer who was the subject of one of the grievances. Sapienza told Singer that she was the subject of a grievance and that the executive board of Local 1105 was on the premises to file grievances. Sapienza asked Singer the whereabouts of her supervisor. Singer pointed the way but said that she was not sure whether the supervisor had arrived at work. Singer told Sapienza that she made decisions on benefit cases not her supervisor.

McDonnell-Foley then approached the group having been alerted to the Union presence by some employees. Sapienza told her that the Local 1105 executive board was there to present grievances and to request appointments to discuss grievances relating to the ABC. Sapienza mentioned the names of various nurses and said that the members of the group wanted to present grievances relating to each of these nurses. McDonnell-Foley told Sapienza that she would talk to him and she

tried to lead the group outside the secure area to a conference room on the public hallway. Instead, Sapienza asked whether they could meet in the employee lounge. After the Union group entered the lounge, McDonnell-Foley said that she was leaving to get a pen and paper but that she would return in a few minutes. She returned to her office and made vain attempts to contact people in company labor relations. McDonnell-Foley instructed those nurses who were already at work to leave their cubicles and sit in the conference room.

Ten minutes after McDonnell-Foley left the lounge the Union representatives went looking for McDonnell-Foley's office. They walked down the hallways of the ABC and took down the names of nurses from signs outside the cubicles. There is no evidence that the Union representatives looked at any confidential medical information while they were in the ABC area. McDonnell-Foley saw the group and she tried to stop them from walking around the area. Pursuant to McDonnell-Foley's instructions, Walsh and Burns followed the Union group and asked for the names of the Union representatives.

Eventually McDonnell-Foley spoke to members of the company labor relations staff by telephone. Next, McDonnell-Foley asked Sias to accompany her to see the Union group. They all met in the hallway. Sapienza repeated his request that she give the Union an appointment to discuss grievances concerning the ABC. McDonnell-Foley said that she would not give him an appointment and she indicated that she wished the Union representatives to leave. McDonnell-Foley told Sapienza that the Union was trespassing. Sapienza denied that they were trespassing and he asserted that the group had a right to be there because they had members at the site and they wanted to present grievances.

The Union representatives and McDonnell-Foley again headed for the employee lounge. McDonnell-Foley repeated her charge that the group was trespassing and she said that she wanted them to leave. McDonnell-Foley mentioned that the Union group could be subject to discipline. Sapienza suggested that McDonnell-Foley contact the Respondent's labor relations staff for instructions on how to proceed and she left the lounge. Eventually, McDonnell-Foley summoned the police. When the officers arrived, she told them that the Union group was trespassing and that she wanted the Union to leave.

Sapienza told the police officers that his group was there to present grievances and that they had the right to be on the premises. Shannon demonstrated his key card and the Union representatives told the police that they had access to the Respondent's locations. The police officers decided that they were witnessing a labor-management dispute and they called for a superior officer. In the meantime, the officers instructed the Union representatives to stay in the lounge. The officers were conducting a criminal investigation and the Union representatives were alleged suspects. Lieutenant Kamensky arrived about 15 minutes later and Sapienza informed him that the Union had access to the premises. Sapienza repeated to Kamensky his request that McDonnell-Foley should make appointments to discuss grievances concerning the ABC. But McDonnell-Foley said that grievances had to be filed with the labor relations staff.

Kamensky told Sapienza that the corporate security staff was on its way to investigate how the Union had gained access to the secure area. Kamensky told Sapienza that his group had to stay in the lounge. Eventually, pursuant to telephonic instructions from Union counsel, Sapienza told Kamensky that unless the Union representatives were going to be arrested they wanted to leave. Kamensky spoke by telephone with Hann who told him that the Respondent did not intend to press charges against the Union representatives. Kamensky decided that this put an end to the ongoing criminal investigation and at this point the Union group was free to leave the premises. At about 10:15am the Union people left the facility.

Sapienza spoke to Singer in a voice loud enough to be heard some distance in the hallways. Sapienza spoke to McDonnell-Foley in a voice loud enough to be heard by a group, but Sapienza did not yell at her. While in the hallways, others in the group also spoke and inquired for the location of various nurse case managers whom they wanted to identify in connection with certain grievances. I do not find that the Union yelled or shouted or chanted in the hallways near the cubicles. Although some noise would unavoidably be created by the presence of 14 people talking and walking down the narrow hallways to the cubicles, I do not find that the Union group took any action to create an undue disturbance in the hallways. There is no credible evidence that the Union group threatened harm to any person at the ABC and there is no evidence that the group looked at confidential information. Consistent with the testimony of Kamensky about the situation in the lounge, I find that while Sapienza was in the lounge he was very aggressive, loud and boisterous but that he was not abusive and he did not scream.

Pursuant to Hann's testimony, I find that the Respondent disciplined its employees who were members of the executive board of Local 1105 for the stated reason that they had invaded the workplace, intimidated employees, disrupted the work of employees and refused to leave when asked.

3. Resolution of legal issues

It is clear that the Union group was engaged in protected activity on the morning of July 14, 1997. The presentation of employee grievances is protected under the Act.²⁰ Local 1105 had brought many grievances relating to the ABC method of handling of employee's absences caused by illness and injury. The uncontradicted testimony shows that the grievances were not being resolved by the employees' supervisors at the lower steps of the grievance procedure because the supervisors had no authority over the decisions made by the ABC and because they were not being given necessary information by the ABC. The Union's attempts to resolve matters directly with the nurse case managers were rendered ineffectual when the nurses stopped returning shop stewards' calls in April 1997. As a result the Union decided to bring grievances directly to the ABC under the contract provision that permits presenting a grievance to a "higher ranking supervisor in the department having authority in the matter." It is not for me to decide the merits of the grievances sought to be presented by the Union. It is enough to find,

and I do, that the Union had numerous grievances that it was trying to present to supervisors at the ABC who had authority over the work done by the nurse case managers. Although the ABC supervisors did not usually deal with the Union concerning grievances the Union was not debarred from presenting grievances to these supervisors where the contract language on its face permitted such a method. The Union's novel interpretation of the contract does not render its efforts unprotected.

It is well established that unless employees engage in egregious conduct while conducting protected activity they do not lose the protection of the Act.²¹ Here, the facts show that the Union group approached individual nurse case managers at their cubicles, informed them that they were the subject of grievances and asked the identity and location of their supervisors. There is no evidence that the Union group stood around and prevented the nurses from proceeding to do their work. No nurse testified that the Union interfered with efforts to complete phone calls or look at the computer. Indeed, the nurses were taken away from their work by McDonnell-Foley who told them to sit in the conference room outside the secure area. The evidence does not show that the Union group deliberately yelled so as to create noise sufficient to prevent work from taking place. Loud talk is not considered abusive where a Union is seeking to present its point of view to management. There is no credible evidence that the Union group threatened any nurses or did anything reasonably calculated to inspire fear of physical danger. No curses or abusive phrases were used. Indeed, the Union took only those actions required to identify the supervisors of the nurse case managers who were the subjects of grievances which the Union wished to present that day.

The Union's actions in requesting to meet with McDonnell-Foley were protected as well. She identified herself as the manager of the ABC and the Union did not lose the protection of the Act by making repeated efforts to schedule a meeting with her to discuss the ABC-related grievances. In this regard, it is clear that the Union group was willing to wait for McDonnell-Foley in the employee lounge in the belief that she would return for the purpose of scheduling a meeting. It was only when McDonnell-Foley did not return that they went in search of her and re-entered the area where the cubicles are located. It was at this point that McDonnell-Foley first expressed her lack of intention to grant grievance appointments to the Union. The Union did not lose the protection of the Act by insisting that it wanted to make grievance appointments. It was entirely proper for the Union to press its point and try to convince McDonnell-Foley that she should meet with them or arrange a meeting to resolve grievances relating to the operation of the ABC. Surely a Union is not supposed to defer to management's view every time the two parties have a difference of opinion. Thus, when McDonnell-Foley told the Union group to leave the Union did not lose the protection of the Act by staying and trying to convince McDonnell-Foley that she should make appointments to discuss the grievances. When McDonnell-Foley informed the Union that it was trespassing the Union did not lose the protection of the Act by trying to convince her otherwise using argu-

²⁰ *Ad Art, Inc.*, 238 NLRB 1124, 1131 (1978), *enfd.* 645 F.2d 669 (9th Cir. 1980).

²¹ *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Columbia University*, 236 NLRB 793, 795 (1978).

ments that appeared reasonable on their face: The Union had gained access to the site using access cards provided by the Respondent; the Union was there to present grievances; and the Union had members working at the site.

Although the Respondent referred to the area behind the locked doors as a secure site, there was no sign limiting access to the ABC workplace. Employees of the ABC mingled freely with unit employees and other employees of the Respondent. All of these employees used the same hallways and the same kitchen and lounge. The evidence shows that Union representatives had long enjoyed unrestricted access to the third floor of the facility without regard to the fact that nurse case managers had been working there since 1995. The evidence also shows that Union representatives had met with employees in the lounge next to the kitchen.

I find that although the Local 1105 group entered the workplace they did not for that reason lose the protection of the Act by seeking to present grievances at the ABC. I find that the Union did not intimidate any employees on July 14 at the ABC. I find that the Union's visit to the ABC on July 14 disrupted the work of some employees but only to a minimal degree. A few nurses were interrupted when they were asked to name their supervisors. The major interruption took place when McDonnell-Foley told the nurses to leave their work stations and sit in the conference room. This occurred while the Union was waiting in the lounge for McDonnell-Foley to return and speak to the executive board. There is no evidence that the nurses could not have continued working while McDonnell-Foley dealt with the Union in the lounge. The record shows that the Union group left the premises at 10:15 a.m. Thus, even if it had been reasonable for the nurses to cease work while the Union group was in the lounge, all of the nurses could have returned to work at that time.²² McDonnell-Foley's testimony that the nurse case managers could not do any work for the rest of the day because they were meeting with mental health nurses is simply incredible. The events of the morning would not reasonably have required psychological counseling for a nurse trained to react with equanimity to life and death situations.²³ I find that the Union did not lose the protection of the Act by refusing to leave when McDonnell-Foley first asked the Union representatives to leave. The Union had a right to try to press its point of view and to demand a meeting with management. Thus the Respondent violated Section 8(a)(1) of the Act when it imposed discipline on its employees who went to the West Red Oak Lane facility on July 14, 1997.

In cases where the General Counsel alleges that an employer has violated the Act by penalizing employees for engaging in protected activity such as filing grievances it is the policy of the Board to find a violation of Section 8(a)(1) of the Act and to decline to decide whether the discharge or suspension also violated Section 8(a)(3) of the Act. *Mast Advertising & Publish-*

ing, 304 NLRB 819, 820 fn. 7 (1991); *Bunney Bros. Construction*, 139 NLRB 1516 (1962). Thus, I shall not reach the Complaint allegation that the Respondent violated Section 8 (a) (3) by suspending the employees who entered the West Red Oak Lane facility on July 14.

The Board has also held that it is error to apply a *Wright Line* analysis to cases where the General Counsel alleges that an employer has violated the Act by penalizing employees for conduct that is part of the *res gestae* of protected activity.²⁴ *Felix Industries*, 331 NLRB 144 (2000); *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994); *Mast Advertising & Publishing*, 304 NLRB 819 (1991). Thus, I shall not consider the *Wright Line* argument advanced by the General Counsel and the Respondent.

As summarized above, Union representatives had been discussing grievances informally with nurse case managers until April 1997 when the nurses stopped returning the Union's telephone calls. At that point, the Union went to the ABC to present grievances to the nurses' supervisors. The article 13, section 1 contract language quoted above provides for presentation of grievances to "the immediate supervisor or a higher ranking supervisor in the department having authority in the matter." The record shows that both an employee's immediate supervisor and the ABC nurse case managers had authority in determining whether an employee would be paid for absence due to illness or injury. Thus, the ABC met the collective bargaining agreement's definition of a "department having authority in the matter." The Union's attempt to present grievances to the supervisors of the individual nurse case managers or to McDonnell-Foley was sanctioned by the contract. The presentation and discussion of grievances has long been recognized as a vital part of the collective bargaining process. The Respondent violated Section 8(a)(5) of the Act by refusing to accept and arrange for the discussion of grievances at the ABC on July 14.

The evidence shows that the Respondent summoned the police to the West Red Oak Lane facility on July 14, 1997. Lieutenant Kamensky, who was called to testify by the Respondent, stated that his officers told him they were investigating an alleged criminal trespass and possession of stolen property. Kamensky's testimony is clear that while the investigation was ongoing the members of the Union group were being detained as suspects and they were not free to leave the lounge. The Union witnesses testified that the police officers told them to stay where they were until the matter was straightened out. After the Respondent decided not to press charges the criminal investigation was over and the Union representatives were permitted to leave the premises. The Respondent called the police because the Union representatives were attempting to present grievances at the ABC facility. The Respondent violated Section 8(a)(1) of the Act by causing the police to detain the employees because they were at the facility to engage in protected activity.²⁵

The Decision of Administrative Law Judge Nations, referred to above, comments on the events of July 14, 1997. The Un-

²² Even if the Union had caused a two-hour cessation of work, that would not have lost its efforts the protection of the Act. *NLRB v. American Mfg. Co.*, 106 F.2d 61, 68 (2d Cir. 1939).

²³ At most, a few nurses saw a bunch of people gathered around their cubicles for a few moments in the early morning of July 14. The Respondent's attempt to equate this with a catastrophic or traumatic event is not convincing.

²⁴ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

²⁵ *Union Child Day Care Center*, 304 NLRB 517, 525 (1991).

ion's presence in the ABC facility was presented as one of many defenses in Judge Nations' case to the claim that the Respondent unduly delayed in providing certain information to Local 1112. In his Decision, Judge Nations wrote that "unions" "besieged" the ABC, "intimidated" the staff and made comments about case managers' children. Judge Nations further wrote that "it is clear to me that their intention was to intimidate the case workers, who, among other things, make decisions as to whether union members' leaves of absence under the FMLA will be approved or disapproved." Of course, the case before Judge Nations did not involve Local 1105 and Judge Nations based his dicta wholly upon the testimony of McDonnell-Foley and other witnesses provided by the Respondent. Indeed, the true purpose of the Union's attempt to present grievances at the ABC on July 14 was not an issue in the case before Judge Nations. Although the Respondent's brief urges that Judge Nations made various "holdings" about the events of July 14, it is clear that he could not make any findings which would be binding in the instant case. In fact, it would deprive the Union of due process to give any weight to Judge Nations' dicta which were based on the testimony of company witnesses in a case where the Union herein was not a party, did not present any witnesses and did not cross examine the company witnesses. In sum, the Respondent's brief is incorrect in urging reliance on JD-178-98.

The General Counsel asserts that the Respondent's lawsuit against the Union is unlawful under the rule of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 737-738 (1983).²⁶ As discussed above, the action of the Union representatives in seeking to present grievances at the ABC was activity protected by Section 7 of the Act and the Union group did not behave in such a way as to deprive the activity of the protection of the Act. As explained by the Board in *Loehmann's Plaza*, 305 NLRB 663, 669-671 (1991), the special requirements of *Bill Johnson's* do not apply once it has been established that a state lawsuit seeks to interfere with a protected activity under the Act. The suit for damages in trespass filed by the Respondent against the Union and the individual members of the executive committee has the stated aim to recover damages for engaging in protected activity. Thus, the lawsuit interferes with the rights of employees under Section 7 of the Act. Accordingly, the lawsuit is unlawful under Section 8(a)(1) of the Act. Because the filing of grievances is actually protected activity, the lawsuit constituted a violation from the date it was filed, July 17, 1997.²⁷

The testimony is undisputed that after July 14, 1997, the Respondent implemented changes in the access of Union repre-

sentatives to the unit employees who work on the third floor of the West Red Oak Lane facility. Scott-Monck knew that for years both Shannon and DeBiase visited Local 1105 members unannounced. Shannon's card was cancelled soon after July 14 and as of November 1997 DeBiase could no longer use the magnetic access card issued to him years ago by the company. Now, each time Shannon and DeBiase visit the facility they must obtain an access card from management and they are required to return the access card upon their departure. It is undisputed that this procedure is a change: Shannon and DeBiase can no longer meet with a unit member unless management is first informed and Union representatives can no longer conduct surprise safety inspections in the workplace.²⁸ I note that the Union representatives herein gave uncontradicted testimony that they have long had access cards which admitted them to all of the Respondent's magnetically secured locations where Local 1105 unit members are employed. Moreover, on at least one occasion when DeBiase came to see unit member Hussey, he met with her outside the work area contrary to the established practice. Although the record is not clear as to why exactly this came to pass, the fact is that the change resulted from DeBiase's inability to gain access to Hussey's workplace without first consulting a member of management.

An employer violates the Act when it makes actual changes in allowing union access to employees in the workplace without giving prior notice to and an opportunity to bargain to the union. *Frontier Hotel & Casino*, 323 NLRB 815, 817-818 (1997). Here the changes consist of forcing the Union representative to seek management's permission to enter the workplace and changing the location of meetings between employees and their representatives. The Respondent seeks to distinguish the instant case from *Frontier Hotel* by citing *Peerless Food Products*, 236 NLRB 161 (1978). However, the Board's Decision in that case supports a finding of violation in the instant case. In *Peerless* the Board said:

Plainly, that Respondent may have perceived some business need . . . for changes in its policy of allowing [the union business agent] unlimited access to the plant does not relieve Respondent of its statutory obligation to bargain Although the policy does not derive from the express terms of the collective-bargaining agreement, the past practice elevates it to a term of employment not susceptible to unilateral change [Citations omitted.]

In *Peerless* the Board found that the unilateral change did not constitute a breach of the bargaining obligation because it was not "material, substantial, and significant." The Board said the only change to limit the representative's access was to remove his right to speak to employees on the production floor about matters unrelated to the collective bargaining agreement. Clearly, the Board viewed the limitation as a *de minimis* alteration.

In the instant case, as in *Peerless*, the change concerns a past practice as to which management may not make a unilateral change. And, indeed, the change is material, substantial and

²⁶ In that case the Supreme Court directed that, except in lawsuits where state jurisdiction is preempted or where the lawsuit has an aim that is illegal under Federal law, the Board must determine whether the lawsuit lacks a reasonable basis and has been filed for retaliatory purposes.

²⁷ Although, as the Respondent's brief points out, the Complaint alleges only that the Respondent sued the Union the lawsuit also names the individuals as defendants. The issue regarding the lawsuit has been fully litigated as to the individuals as well as the Union and the remedy may properly provide relief for both the Union and the individual defendants.

²⁸ Before admitting DeBiase to the workplace, Scott-Monck went to see if the unit member he wished to see was present.

significant. The Union must now disclose to management every visit to the workplace and indicate which member of the unit is being visited. The Union may not conduct surprise visits to check for safety hazards as it did formerly. I find that the change in access violates Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. By suspending its employees because they sought to present grievances at the Absence Benefits Center on July 14, 1997, the Respondent violated Section 8(a)(1) of the Act.
2. By refusing to accept grievances and arrange for the discussion of grievances at the Absence Benefit Center on July 14, 1997 the Respondent violated Section 8(a)(5) and (1) of the Act.
3. By causing the police to detain its employees because they sought to present grievances at the Absence Benefit Center on July 14, 1997, the Respondent violated Section 8(a)(1) of the Act.
4. By filing a lawsuit for trespass against the Union and against the individual members of the Union Executive Board on July 17, 1997, because they sought to present grievances at the Absence Benefit Center the Respondent violated Section 8(a)(1) of the Act.

5. By unilaterally changing the terms and conditions of the Union's right to access to unit employees at the West Red Oak Lane facility the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The General has not shown that the Respondent violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully suspended employees, it must make them whole for any loss of earnings and other benefits plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must be ordered to withdraw the lawsuit in Index No. 11359/97 filed on July 17, 1997 and it must be ordered to make the Union and the individual defendants whole for all legal expenses, plus interest as computed in *New Horizons for the Retarded*, *supra*, incurred in the defense of the lawsuit since the date of its filing. *Loehmann's Plaza*, *supra* at 672.

[Recommended Order omitted from publication.]